Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

PACESETTER CONSTRUCTION COMPANY, INC.,
Petitioner,

v.

CARPENTERS 46 NORTHERN CALIFORNIA COUNTIES
CONFERENCE BOARD,
Respondent.

Petition For A Writ Of Certiorari To The United States
Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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June, 1995

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QUESTIONS PRESENTED

1. Whether this Court's intervening decision in *First Options of Chicago, Inc. v. Kaplan*, _____ U.S. _____, 115 S.Ct. 1920, 63 U.S.L.W. 4459 (1995), that absent "clear and unmistakable evidence" of an agreement between the parties to submit the question of arbitrability to the arbitrator, the question of arbitrability is subject to independent judicial review, is in direct conflict with the decision of the United States Court of Appeals For The Ninth Circuit below.

2. Whether a party that does not clearly and unmistakably agree to submit the issue of arbitrability to arbitration but nonetheless appears at the arbitration and objects to the arbitrability of the grievance is entitled to independent judicial review of the question of arbitrability.

3. Whether the Ninth Circuit erred by failing to find that the Board of Adjustment acted in manifest disregard of the law when it applied a post-*Deklewa* standard for repudiation of an 8(f) Agreement to a repudiation that occurred prior to the *Deklewa* decision.

PARTIES TO THE PROCEEDING

The parties to the proceedings below and before this Court are:

1. Pacesetter Construction Company, Inc.; and[1/]

2. Carpenters 46 Northern California Counties Conference Board.

[1/] Pacesetter Construction, Inc. has no parent company; nor does it have any subsidiary that is not wholly owned.

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Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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Pacesetter Construction Company, Inc. respectfully petitions for a *writ of certiorari* to review the judgment of the United States Court of Appeals For The Ninth Circuit in this case.

OPINIONS BELOW

The opinions of the Court of Appeals (App., *infra*, 1a-4a) and of the District Court (App., *infra*, 5a-15a) are unreported.

JURISDICTION

The jurisdiction of the district court was invoked under 29 U.S.C. §185 when the Respondent sought confirmation of an arbitration award. The Court of Appeals entered its judgment on March 22, 1995 (App., *infra*, 1a-4a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

A. Section 8(f) of the National Labor Relations Act, 29 U.S.C. §158(f), as amended.

B. Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. §185, as amended.

Relevant portions of these statutory provisions are reproduced at App., *infra*, 16a-19a.

STATEMENT

A. Pacesetter And Its Pre-Hire Agreement With The Carpenters Union

Pacesetter Construction Company ("Pacesetter"), originally a partnership of two brothers, Jeffery and Gary Johnson, commenced business as a framing contractor in the building and construction industry on February 19, 1971. At the outset, Pacesetter signed a pre-hire agreement[1/] with the Carpenters 46 Northern California Counties Conference

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[1/] Pre-hire agreements are authorized under 29 U.S.C. §158(f).

Committee, United Brotherhood of Carpenters and Joiners of America, AFL-CIO ("Union"), agreeing to hire its construction employees through the union hiring hall for its construction projects. In 1974, Pacesetter signed a two-page document binding it to the 46 Northern California Counties Carpenters Master Agreement ("Master Agreement" or "Agreement"), which had an effective date of June 15, 1974 to June 15, 1977. Pacesetter has not signed another agreement with the Union since June 1974.

B. Pacesetter Repudiated The Pre-Hire Agreement With The Carpenters Union

From its inception in 1971, Pacesetter never employed a regular, permanent, or stable workforce other than Jeffery and Gary Johnson and an office secretary. Nor has the Union ever been a majority representative of any appropriate unit of employees at Pacesetter. For each construction project, Pacesetter hired employees as needed for that project and terminated them as the project approached completion.

In October 1975, due to its inability to obtain any carpenters through the union hiring hall, Pacesetter informed the Union that it was repudiating the pre-hire Agreement. Thereafter, Pacesetter operated its construction business as a non-union framing contractor.

C. Pacesetter Ceased Business Operations In 1976.

In early 1976, Jeffery Johnson verbally informed a business representative of Carpenters Local 1235 that Pacesetter was no longer a union contractor and that Pacesetter would be going out of business in the near future. In 1976, Pacesetter ceased business operations.

In 1979, approximately three years after it went out of business, Pacesetter returned to the construction business. Thereafter, the Union made several attempts to get Pacesetter to sign a new pre-hire agreement. In each instance, Pacesetter refused. Its only employees were Jeffery Johnson as President, Gary Johnson as Job Superintendent, and an office secretary. Thus, since 1975, Pacesetter has operated as a non-union contractor that recruited its construction employees on a temporary basis through newspaper advertising and help wanted bulletins.

D. The Union's 1980 Grievance Against Pacesetter

On September 24, 1980, the Union, after observing Pacesetter operating as a non-union contractor on a housing project in Modesto, California, filed a grievance asserting that Pacesetter was violating Sections 1 through 51 of the Master Agreement. The grievance alleged "violation of the entire contract (Using non-union carpenters on Housing Project)."

The Union's grievance was brought before the Carpenters Board of Adjustment ("Board of Adjustment" or "Board") and Arbitrator Adolph Koven on May 13, 1981. Pacesetter did not challenge the Union's assertion that it was not operating under the terms of the Agreement. Pacesetter's only defense at the hearing was an affirmative defense that it was not bound by the Agreement.

Thus, the only evidence submitted to Arbitrator Koven concerned Pacesetter's multiple grounds for asserting that it was not bound by the Agreement. This evidence included testimony that the Agreement had been repudiated by Pacesetter in 1975 and 1976; that Pacesetter had discontinued

business in 1976; that the Union had knowledge of Pacesetter's repudiation; and that the Union had not sought to bind Pacesetter to a pre-hire agreement since 1975. After receiving Pacesetter's evidence in support of its affirmative defense, Arbitrator Koven issued a Decision and Award, dated May 20, 1981, which stated: "Having heard all the evidence provided by both sides, and after careful consideration of the matter, the grievance is denied."

During the ten years that followed Arbitrator Koven's Decision and Award, Pacesetter relied upon the award by continuing to operate as a non-union contractor. During this ten-year period, the Union never once claimed that Pacesetter was bound by the Agreement. In the interim, however, Arbitrator Koven died.

E. The Union's 1991 Grievance Against Pacesetter

In April, 1991, a business representative of the Union, while driving past a construction site in San Jose, California, noticed that Pacesetter was employing non-union carpenters on the job site and caused a grievance to be filed. The Union's grievance asserted the same allegations that had been submitted to the Board of Adjustment and Arbitrator Koven in 1981, that Pacesetter was not abiding by the Master Agreement.

At the Board of Adjustment hearing on January 14, 1992, Pacesetter appeared and objected to the proceeding and challenged the Board of Adjustment's jurisdiction to decide the grievance, based upon its repudiation of the pre-hire Agreement in 1975 and 1976, its cessation of business operations in 1976 and Arbitrator Koven's 1981 award denying the Union's prior grievance. In short, Pacesetter

objected to the arbitrability of the Union's grievance by asserting that it was not a party to the Carpenters Master Agreement. Despite the uncontroverted evidence that Pacesetter was not bound by the Master Agreement, the Board of Adjustment issued a decision and award upholding the Union's grievance.

F. The Court Proceedings Below

On May 13, 1992, the Union petitioned the Superior Court of the City and County of San Francisco to confirm the Board of Adjustment's award. On June 5, 1992, Pacesetter removed the action to district court under 28 U.S.C. §1441(a), pursuant to §301 of the Labor Management Relations Act (29 U.S.C. §185). On June 8, 1992, Pacesetter answered the Union's petition, cross-petitioned to vacate the award, and counter-claimed for declaratory relief requesting the court to issue a declaratory judgment finding that it was not subject to the Agreement. On July 15, 1992, the Union answered the cross-petition and filed a counterclaim for declaratory relief requesting the court to issue a declaratory judgment finding that Pacesetter was bound to the Agreement. Both parties subsequently filed cross-motions for summary judgment.

One argument advanced by Pacesetter in its summary judgment motion was that the repudiation of a pre-hire agreement is an issue to be determined by the court, not the arbitrator. Pacesetter contended that it did not submit the issue of repudiation — i.e., the question of arbitrability — to the Board of Adjustment. Nonetheless, on August 13, 1993, the district court issued an order and judgment confirming the March 11, 1992 Board of Adjustment decision and denying Pacesetter's motion for summary judgment and declaratory

relief. The district court found that because Pacesetter did not first present "the repudiation issue to the court without submitting to arbitration," it did not preserve the issue of repudiation for the court but consented to the jurisdiction of the arbitration panel to determine the issue of arbitrability. It held that under Ninth Circuit authority, Pacesetter could not "relitigate" the arbitrability issue before the court.

On August 23, 1993, Pacesetter appealed the district court's judgment and order. Pacesetter argued that the Board of Adjustment exceeded its jurisdiction by rendering an award under a labor agreement to which Pacesetter was not a party. Pacesetter also argued that although it appeared before the arbitration panel in 1992, it did not voluntarily and intentionally submit the repudiation question to the jurisdiction of the Board of Adjustment and thus, under prevailing Ninth Circuit law, waive its right to independent judicial review of the arbitrability question.

On March 22, 1995, the Ninth Circuit entered judgment affirming the decision of the district court. The court stated that because Pacesetter did not preserve the issue of repudiation in "ways in which [a] party to arbitration can preserve an issue for judicial determination," it "implied its consent to have the Board decide whether it repudiated the Agreement."

Pacesetter now petitions this Court for a *writ of certiorari* to review the Ninth Circuit's decision.

REASONS FOR GRANTING THE PETITION

A. Introduction

This Court recently, unanimously, held that unless the parties clearly agree to submit the question of arbitrability to arbitration, the arbitrability of a dispute is subject to independent review by the courts. *First Options of Chicago, Inc. v. Kaplan, et al.*, _____ U.S. _____, 115 S.Ct. 1920, 63 U.S.L.W. 4459 (1995). This Court's holding in *First Options* confirms a long line of Supreme Court precedent with a history of more than three decades that the "question of arbitrability is for the courts to decide." *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 583, n.7, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960). The Ninth Circuit's decision below conflicts with these precedents, as well as with the decisions of three other Courts of Appeal regarding who has primary power to decide questions of arbitrability, the courts or arbitrators. If permitted to stand, the Ninth Circuit's decision below empowers arbitrators to usurp the authority of the courts to determine the extent of arbitral jurisdiction and creates a conflict in the standards applied by the federal courts for determining the question of arbitrability.

B. The Ninth Circuit's Decision Below Is In Direct Conflict With This Court's Decision In *First Options*.

This case concerns the question of whether this Court's recent decision in *First Options* is controlling precedent in cases involving judicial review of a labor arbitration award pursuant to section 301(a) of the Labor Management Relations Act, 29 U.S.C. §185(a). In the

present case, Petitioner Pacesetter did not agree to submit the arbitrability question to arbitration and sought an independent judicial determination of the arbitrability question in both the district court and the Ninth Circuit. Both courts refused to review the arbitrability question independently on the grounds that Pacesetter had failed to take affirmative action to preserve the issue for judicial resolution.

Neither the district court nor the Ninth Circuit concluded that Pacesetter had agreed to arbitrate the question of arbitrability. Based solely upon the fact that Pacesetter argued the arbitrability question to the Board of Adjustment, the Ninth Circuit found:

> Pacesetter knowingly and voluntarily submitted the issue of repudiation [arbitrability] to the Board in 1992 . . . Pacesetter did not preserve the question of whether the Board had jurisdiction over the repudiation issue by objecting to the Board's authority to decide the repudiation issue. *Cf. Van Waters & Rogers, Inc. v. International Brotherhood of Teamsters*, 913 F.2d 736, 740 (9th Cir. 1990) (describing ways in which party to arbitration can preserve an issue for judicial determination). Because Pacesetter submitted the repudiation to the Board without objecting to the Board's jurisdiction over the issue, it implied its consent to have the Board decide whether it repudiated the Agreement. *George Day Construct. Co. v. United Brotherhood of Carpenters & Joiners*, 722 F.2d 1471 (9th Cir. 1984)

App., *infra*, 3a-4a.

In *First Options*, this Court addressed the question, who has primary authority to determine questions of arbitrability, the court or arbitrator? This Court unanimously held that *who* has the primary power to decide arbitrability turns upon what the parties agreed about that matter. *First Options*, 63 U.S.L.W. at 4461. The Court also held that, when deciding whether the parties agreed to arbitrate a certain matter, the courts should apply ordinary state law principles of contract formation. *Ibid.* The Court noted, however, that under its prior decisions in *ATT Technologies, Inc. v. Communication Workers*, 475 U.S. 643, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986) and *Warrior & Gulf*, 363 U.S. 583, an additional qualification was applicable to determine whether the parties agreed that the arbitrator should decide arbitrability. The Court stated:

> Courts should not assume that the parties agreed to arbitrate arbitrability unless there is "clea[r] and unmistakabl[e]" evidence that they did so. *ATT Technologies*, *supra*, at 649; see *Warrior & Gulf*, *supra*, at 583, n.7. In this manner the law treats silence or ambiguity about the question "*who* (primarily) should decide arbitrability" differently from the way it treats silence or ambiguity about the question "*whether* a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement" — for in respect to this latter question the law reverses the presumption.

Ibid. (emphasis in original).

Thus, *First Options* establishes that, absent clear and unmistakable evidence of an agreement, the party challenging the arbitrator's jurisdiction is entitled to a presumption that arbitrability is a question preserved for independent judicial resolution. Moreover, as this Court observed, merely arguing the arbitrability issue to the arbitrator does not clearly indicate a party's willingness to arbitrate arbitrability. *Id.* at 4461-62.

Ficek v. Southern Pacific Co., 338 F.2d 655 (CA9 1964), *cert. den.*, 380 U.S. 988, 85 S.Ct. 1362, 14 L.Ed.2d 280 (1965), is the first in a line of Ninth Circuit cases[2/] addressing the issue of who has primary authority to decide questions of arbitrability. In *Ficek*, the Ninth Circuit held that an employer's mere submission of the merits of a dispute to arbitration without affirmatively reserving the question of arbitrability constituted an implied consent to allow the arbitrator to determine arbitrability.

Similarly, in *International Brotherhood of Teamsters, Local 117 v. Washington Employers, Inc.*, 557 F.2d 1345 (CA9 1977), the Ninth Circuit placed the burden on the party challenging the arbitrator's jurisdiction to act affirmatively in order to preserve the arbitrability question for independent

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[2/] See, *e.g.*, *International Brotherhood of Teamsters, Local 117 v. Washington Employers, Inc.*, 557 F.2d 1345 (CA9 1977); *Francesco's B., Inc. v. Hotel and Restaurant Employees*, 659 F.2d 1383 (CA9 1981); *George Day Construction Co. v. United Brotherhood of Carpenters*, 722 F.2d 1471 (CA9 1984); *Fortune, Alsweet & Eldridge, Inc. v. Daniel*, 724 F.2d 1355 (CA9 1983); *Orion Pictures v. Writers Guild of America*, 946 F.2d 722 (CA9 1991).

judicial review. *Washington Employers* involved a challenge to an arbitrator's authority that arose after the arbitrator had decided the merits of a dispute. The union sought enforcement of the award in the district court. The employer opposed enforcement, in part, on the ground that the dispute was not arbitrable. The district court refused enforcement.

The Ninth Circuit reversed, holding that the employer had the opportunity to raise the arbitrability issue in the district court prior to the arbitration but did not do so. By subsequently stipulating to allow the arbitrator to decide the dispute, the employer evinced an intent to allow the arbitrator to decide the merits and the arbitrability question. *Id.* at 1350. With regard to the arbitrability question, the Ninth Circuit stated that the employer could have preserved the question for judicial determination by making an appropriate reservation in conjunction with the stipulation to arbitrate. Because the employer failed to do so, the Ninth Circuit found that it waived the right to an independent judicial examination of the question of arbitrability. *Ibid.*

The line of Ninth Circuit cases that began with *Ficek* and *Washington Employers* culminated in the Ninth Circuit's decision in *George Day Construction Co. v. United Brotherhood of Carpenters*, 722 F.2d 1471 (CA9 1984). In *George Day*, the court held that a party can preserve the issue of arbitrability for independent judicial determination only by acting in one of two ways. First, a party can preserve the question of arbitrability by objecting to the arbitrator's authority and refusing to argue the arbitrability issue to the arbitrator. *Id.* at 1475. Second, the party can preserve the question by making an objection to jurisdiction and an express reservation of the question on the record. *Ibid.* The *George Day* court held that a party's failure to

take action in one of the manners specified constitutes that party's implied consent to allow the arbitrator to decide the arbitrability issue and a waiver of that party's right to an independent judicial determination of the issue. *Ibid.*

In the present case, it is undisputed that Pacesetter did not clearly agree to arbitrate the arbitrability question. Indeed, the Union does not assert that Pacesetter clearly agreed to arbitrate arbitrability. Instead, the Union, relying upon the Ninth Circuit's decisions in *Ficek* and *George Day*, has opposed Pacesetter's requests for an independent judicial determination of the arbitrability issue by asserting that Pacesetter waived its right to a judicial determination by appearing and arguing the arbitrability question before the Board of Adjustment in 1992. The Ninth Circuit, following the *George Day* line of cases, found that Pacesetter consented to the Board of Adjustment's jurisdiction to decide arbitrability.

According to *First Options*, however, the Ninth Circuit should have looked for clear and unmistakable evidence of an agreement between Pacesetter and the Union to arbitrate the arbitrability question. The Ninth Circuit made no such inquiry and did not require such a showing by the Union.

Moreover, in *First Options*, this Court held that absent clear and unmistakable evidence of an agreement to arbitrate the arbitrability question, the court must presume that the party challenging the arbitrator's jurisdiction intended to preserve that issue for judicial determination. *First Options*, 63 U.S.L.W. at 4461. The Ninth Circuit applied this presumption in reverse. It found that because Pacesetter did not act affirmatively to preserve the arbitrability issue, it

implied its consent to the Board's authority to decide the issue, and it waived its rights to a judicial determination. Therefore, the decision below is in direct conflict with this Court's intervening decision in *First Options*. Accordingly, this Court should grant plenary review.

C. This Court's Decision In *First Options* Is Controlling Precedent In Arbitration Review Cases Arising Under §301 Of The Labor Management Relations Act.

Although *First Options* arose under the Federal Arbitration Act, 9 U.S.C. §1, *et seq.*, and this case arises under §301(a) of the Labor Management Relations Act, 29 U.S.C. §185(a), the Court's analysis in *First Options* is equally applicable in both contexts. The issue decided by this Court in *First Options* and raised by this petition for *writ of certiorari* is a fundamental issue concerning the proper allocation of power and authority between the federal courts and arbitrators to decide the scope of an arbitrator's jurisdiction.

In the context of judicial review of both commercial and labor arbitrations, the courts have recognized that the question of arbitrability is a question of law for the courts to decide. See, *e.g.*, *Warrior & Gulf*, 363 U.S. 574; *Virginia Carolina Tools, Inc. v. International Tool*, 984 F.2d 113 (CA4), *cert. den.*, 113 S.Ct. 2930, 124 L.Ed.2d 681 (1993); *S+L+H S.p.A. v. Miller-St. Nazianz, Inc.*, 988 F.2d 1518 (CA7 1993). Indeed, in both contexts, this Court has recognized the fundamental principle of arbitration that: "[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit." *ATT Technologies*, 475 U.S. at 648. In

First Options, this Court simply recognized the applicability of this basic principle in the commercial arbitration context.

In *First Options*, this Court integrated basic standards for judicial review of arbitration awards into the commercial arbitration context. The principles recognized by this Court in *First Options* were derived from the extensive historical experience of the federal courts in reviewing labor arbitration cases under §301 of the Labor Management Relations Act.

The policy and statutory concerns involved in resolving the basic question of *who* should have primary authority to determine the scope of any arbitrator's jurisdiction are identical under the Federal Arbitration Act and under §301. Under both statutes, arbitration is recognized as a preferred means for resolving disputes. See, *e.g.*, *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960); *Moses H. Cone Hospital v. Mercury Construction Corporation*, 460 U.S. 1, 24-25, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). Moreover, under both statutes, the courts give considerable deference to the decisions of arbitrators concerning matters the parties agreed to arbitrate. See, *e.g.*, *Steelworkers v. American Manufacturing Co.*, 363 U.S. 564, 567-568, 80 S.Ct. 1343, 4 L.Ed.2d 1403 (1960); *First Options*, 63 U.S.L.W. at 4462.

On the other hand, under both statutes, the arbitrator's jurisdiction is defined by the parties' agreement. *Warrior & Gulf*, 363 U.S. at 582; *Mitsubishi Motors v. Soler Chrysler-Plymouth*, 473 U.S. 614, 626, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985). If the parties did not agree to arbitrate a particular question, the court, under both statutory schemes, decides the question like it would any other question the

parties did not agree to arbitrate, namely independently. *First Options*, 63 U.S.L.W. at 4461.

The *ratio decidendi* of *First Options*, that absent clear and unmistakable evidence of an agreement to arbitrate arbitrability, arbitrability is a question for independent judicial review determination, was derived from this Court's prior decisions in *Warrior & Gulf* and *ATT Technologies*, cases that were decided under §301. Because the Court's holding in *First Options* was predicated upon precedent developed under §301, that decision should be applied as binding precedent in arbitration review cases arising under that statute.

Because the Ninth Circuit's decision below, App., *infra*, 1a-4a, is in direct conflict with this Court's decision in *First Options*, Pacesetter respectfully petitions this Court, pursuant to Rule 10.1(a) of the Rules of the Supreme Court of the United States, for a *writ of certiorari* to the United States Court of Appeals For The Ninth Circuit to review the decision below. Pacesetter further respectfully requests that this Court, on the authority of its intervening decision in *First Options*, reverse the judgment of the United States Court of Appeals For The Ninth Circuit and remand the case for further proceedings consistent with this Court's decision in *First Options*.[3/]

[3/] *Helvering v. Wiese*, 292 U.S. 614, 54 S.Ct. 862, 78 L.Ed. 1473 (1934).

D. The Ninth Circuit's Decision Below Is In Conflict With The Decisions Of The Third, Seventh And Second Circuits.

The Ninth Circuit's decision in the case below illustrates a conflict in the courts of appeals concerning the question of *who*, an arbitrator or the court, has primary power to determine the arbitrability of disputes. On one side stands the Ninth Circuit, which holds that a party who opposes arbitrability but participates in arbitration without expressly reserving its right to independent judicial review of the arbitrability question is deemed impliedly to consent to the arbitrator's authority to decide the arbitrability question and to waive its right to judicial review of that question. *George Day*, 722 F.2d 1471. The Ninth Circuit places the burden on the party objecting to the arbitrator's jurisdiction to take affirmative steps to preserve the arbitrability question for judicial review.

The Sixth and Eighth Circuits are in apparent agreement with the Ninth Circuit's decision in *George Day*. See, *e.g.*, *Vic Wertz Distributing v. Teamsters Local 1038*, 898 F.2d 1136, 1138-1139 (CA6 1990) (where party opposing arbitrability presented evidence and testimony on issue and arbitrator has rendered decision, arbitrability question not subject to independent judicial review); and *Franklin Electric Co. v. International Union, UAW*, 886 F.2d 188, 192 (CA8 1989) (although record clear that party objected to arbitrator's jurisdiction to decide arbitrability question, party empowered arbitrator to decide question by not expressly preserving issue for initial judicial determination).

In contrast, the Third Circuit has long adhered to the

rule that "[t]he existence and extent of an obligation to settle disputes through arbitration is a contractual matter subject to judicial determination, and any claim that the parties intended to exclude the courts from consideration of arbitrability must be borne by 'a clear demonstration of that purpose.'" *Local 719, American Bakery & Confectionery Workers of America, AFL-CIO v. National Biscuit Company*, 378 F.2d 918, 921 (CA3 1967). In *National Biscuit*, a union opposed arbitration of a dispute with the employer, but, nonetheless, participated in four days of hearings on the merits of the dispute. The arbitrator decided in favor of the employer. The question before the Third Circuit was whether by participating on the merits of the dispute after the arbitrator had decided the arbitrability question, the union forfeited its right to contest arbitrability in a judicial forum. *Ibid.* The court, citing to, *inter alia*, *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 547, 84 S.Ct. 909, 11 L.Ed.2d 898 (1964) and *Warrior & Gulf*, 363 U.S. at 583, n.7, found that because there was not a clear demonstration of the parties' intent to exclude the arbitrability issue from judicial review, the union was entitled to an independent judicial determination of the issue. *Ibid.*

In support of its conclusion, the Third Circuit explained that to preclude the union from obtaining a judicial determination of the arbitrability would require the "adoption of a rule that would require a party disputing the issue to seek an injunction against arbitration before the proceedings commence, or to refrain from participating on that issue, or to seek court action immediately upon an arbitrator's affirmation of his own jurisdiction, at the penalty of waiver." *Ibid.* The court stated,

> No such procedure is required by statutory or decisional law . . . Since federal labor policy

> with respect to arbitration favors the establishment of a private juridical system, there is even less reason to make resort to interstitial judicial activity mandatory, when the possibility exists that a labor dispute can be settled without any use of the courts whatsoever. Thus, where as here the reluctant party has presented its objection to arbitrability to the arbitrator and has not thereafter clearly indicated its willingness to forego judicial review, we believe that the issue is sufficiently preserved for our subsequent inquiry.

Id. at 921-922.

The Third Circuit expanded its holding in *National Biscuit* in *Pennsylvania Power Co. v. Local Union No. 272 of IBEW*, 886 F.2d 46 (CA3 1989). In *Penn Power*, the employer challenged the arbitrability of a union's grievance but, nevertheless, agreed to submit both the issue of arbitrability and the merits of the grievance to arbitration. The arbitrator, concluding that the grievance was arbitrable, decided the merits in the union's favor. The district court enforced the award. The Third Circuit reversed.

Addressing the union's argument that by submitting the question of arbitrability to the arbitrator and neglecting to seek a court order staying arbitration, the employer waived its right to judicial review, the Circuit held that "the fact that [Penn Power] argued the merits before the arbitrator will not be construed as a waiver of its right to judicial review on the arbitrability question." *Id.* at 50. For there to be a waiver, the court stated, the party submitting to arbitration must

"clearly indicate his willingness to forego judicial review." *Ibid.* Although Penn Power "voluntarily submit[ted]" the arbitrability issue to arbitration, it nonetheless objected to the arbitrability of the issue. Thus, "waiver will not be inferred." *Ibid.*

More recently, in *Lukens Steel v. United Steelworkers of America*, 989 F.2d 668, 679 (CA3 1993), the Third Circuit reiterated the position articulated by this Court in *ATT Technologies*, 475 U.S. at 648, that "arbitration will not be compelled by a federal court unless a prior determination as to arbitrability is made by the court (or unless the parties expressly provide that the determination as to the arbitrability may be made by the arbitrator)." The court added that to preserve an objection to arbitrability, a party need only state his or her objection on the record at the arbitration. The party may then proceed with the arbitration and raise objection at a later date in an enforcement proceeding. *Id.* at 679, n.11.

The Seventh Circuit has adopted a position similar to that of the Third Circuit. In *International Association of Machinists and Aerospace Workers, Lodge No. 1777. v. Fansteel, Inc.*, 900 F.2d 1005 (CA7), *cert. den.*, 498 U.S. 851, 111 S.Ct. 143, 112 L.Ed.2d 109 (1990), the employer objected to the arbitrability of a union grievance but participated in an arbitration hearing. In considering whether the employer waived its objections to arbitrability by participating in the arbitration, the Seventh Circuit held that the employer, "carefully and explicitly, in unambiguous language, made known to the arbitrator and the union its clear intention that it was maintaining its objections to arbitrability even though it was agreeing to proceed with the arbitration hearing." *Id.* at 1009. Thus, according to the

Seventh Circuit, it did not waive its right to independent judicial review of the arbitrability question.

The Seventh Circuit explained that both precedent and public policy support a rule that permits a party to proceed with an arbitration hearing subject to the right to challenge later the grievance's arbitrability in a judicial forum. *Id.* at 1010. In fact, the Seventh Circuit found that judicial resources would be conserved by such a standard because a decision by the arbitrator on the arbitrability issue might result in the avoidance of judicial involvement. *Id.* at 1009. The court also reasoned that "permission for the non-initiating party to preserve arbitrability objections following the arbitration hearing merely permits the non-initiating party to make the same decision concerning arbitrability that the initiating party made prior to submission of the decision to arbitrate." *Ibid.*

The Second Circuit has articulated the rule that "courts cannot be expected to place their stamp of approval upon his [the arbitrator's] action without making some examination of his jurisdiction to act . . . more exhaustive judicial review of this question is appropriate after the award has been made than before the award in a suit to compel arbitration; in this way, the court receives the benefit of the arbitrator's interpretative skills as to the matter of his contractual authority." *Torrington Co. v. Metal Products Workers Union Local 1645, UAW*, 362 F.2d 677, 680-681, n.6 (CA2 1966).

This Court made clear in the *Steelworkers Trilogy* that arbitration lies at the heart of the system of industrial self-government. *American Manufacturing*, 363 U.S. 564; *Warrior & Gulf*, 363 U.S. 574; and *Enterprise Wheel*, 363

U.S. 593. Arbitration "is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the various needs and desires of the parties." *Warrior & Gulf*, 363 U.S. at 581.

However, "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *ATT Technologies*, 475 U.S. at 648 (citing *Warrior & Gulf*, 363 U.S. at 582, and *American Manufacturing Co.*, 363 U.S. at 570-571). To ensure that this fundamental principle of federal labor law is realized, this Court has also made clear that the question of arbitrability — whether a collective bargaining agreement creates the duty to arbitrate a particular grievance, "is undeniably an issue for judicial determination." *Id.* at 649. "[A] compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty." *John Wiley & Sons*, 376 U.S. at 546-547.

As this Court articulated in *Warrior & Gulf*, an arbitrator "has no general charter to administer justice for a community which transcends the parties. He is rather part of a system of self-government created by and confined to the parties." *Warrior & Gulf*, 363 U.S. at 581 (citing *Shulman, Reason, Contract, and Law in Labor Relations*, 68 Harv.L.Rev. 999, 1016 (1955)). "Where the assertion by the claimant is that the parties excluded from court determination not merely the decision of the merits of the grievance but also the question of arbitrability, vesting power to make both decisions in the arbitrator, the claimant must bear the burden of a clear demonstration of that purpose." *Id.* at 583, n.7.

Thus, "just as an employer has no obligation to arbitrate issues which it has not agreed to arbitrate, so a fortiori, it cannot be compelled to arbitrate if an arbitration clause does not bind it at all." *John Wiley & Sons*, 376 U.S. at 547.

In *ATT Technologies*, 475 U.S. at 649, this Court further explained that "[u]nless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator." This is so because, as explained recently by this Court, "who — court or arbitrator — has the primary authority to decide whether a party has agreed to arbitrate can make a critical difference to a party resisting arbitration." *First Options*, 63 U.S.L.W. at 4461. If a labor arbitrator had the power to determine his own jurisdiction, the "arbitrator would not be constrained to resolve only those disputes that the parties have agreed in advance to settle by arbitration, but, instead, would be empowered 'to impose obligations outside the contract limited only by his understanding and conscience.'" *ATT Technologies*, 475 U.S. at 651, citing *Cox, Reflections Upon Labor Arbitration*, 72 Harv.L.Rev. 1482, 1509 (1959). The willingness of parties to enter into arbitration agreements would be "drastically reduced," and the result would undercut the longstanding federal policy of promoting industrial harmony through the use of collective-bargaining agreements. *Ibid.* Thus, it is for the court, not the arbitrator, to decide in the first instance whether a dispute is to be resolved through arbitration. *Ibid.*

Almost forty years ago, in *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 77 S.Ct. 912, 1 L.Ed.2d 972 (1957), this Court assigned federal courts the task of fashioning a body of substantive law to apply to suits arising

under §301(a) of the Labor Management Relations Act. The Ninth Circuit's determination that a party who opposes arbitration may inadvertently waive independent judicial review of the arbitrability question eviscerates the uniformity necessary to the adoption of a cohesive federal labor policy regarding the respective roles of the arbitrator and the courts. The Ninth Circuit's decisions give arbitrators broader authority than this Court prescribed in the *Steelworkers Trilogy* by allowing arbitrators to determine their own jurisdiction even if the parties did not expressly agree to so empower the arbitrator. Such a broadening of arbitral powers conflicts with the decisions of other circuits and discourages parties from voluntary resort to labor arbitration, a policy that this Court has deemed so fundamental in fashioning our national labor policy.

A party who opposes arbitrability yet participates in arbitration in the Sixth, Eighth and Ninth Circuits will be precluded from seeking independent judicial review of the arbitrability question. To preserve the right to a judicial determination of the arbitrability question in these circuits, a party must take affirmative steps to preserve its rights.

In the Third, Seventh and Second Circuits, a party can obtain independent judicial review of the arbitrability question merely by objecting to the arbitrator's authority. This dichotomy of standards for determining who has primary authority to resolve arbitrability disputes is antithetical to the federal labor policy favoring the establishment of a uniform body of federal law for the interpretation and enforcement of collective bargaining agreements under §301. *Lincoln Mills*, 353 U.S. 448. Accordingly, Pacesetter respectfully requests that this Court grant its petition for *writ of certiorari* in order

to resolve the conflict in the decisions of the courts of appeals.

E. The Ninth Circuit Erred By Failing To Find That The Board Of Adjustment Acted In Manifest Disregard Of The Law When It Applied A Post-*Deklewa* Standard For Repudiation Of An 8(f) Agreement To A Repudiation That Occurred Prior To The *Deklewa* Decision.

In *Camping Construction Co. v. District Council of Iron Workers*, 915 F.2d 1333 (CA9 1990), *cert. den.* 500 U.S. 905, 111 S.Ct. 1684, 114 L.Ed.2d 79 and 500 U.S. 953, 111 S.Ct. 2260, 114 L.Ed.2d 713 (1991), the Ninth Circuit held that whether a pre-hire agreement, entered into pursuant to §8(f) of the National Labor Relations Act, 29 U.S.C. §158(f), as amended, was repudiated prior to February 20, 1987, the date of the National Labor Relations Board's decision in *John Deklewa & Sons*, 282 NLRB No. 184 (1987), *enforced sub nom. International Ass'n of Bridge, Structural & Ornamental Iron Workers, Local 3 v. NLRB*, 843 F.2d 770 (CA3), *cert. den.*, 488 U.S. 889, 109 S.Ct. 222, 102 L.Ed.2d 213 and 488 U.S. 889, 109 S.Ct. 222, 102 L.Ed.2d 213 (1988), is an issue for judicial, not arbitral, determination. The court reasoned that an employer's pre-*Deklewa* right to unilateral repudiation of a pre-hire agreement "was not a right created by the collective-bargaining agreement itself or by general principles of contract law, but rather by a federal statute." *Id.* at 1338. Thus, prior to *Deklewa*, §8(f) pre-hire labor contracts were terminable at will. Accordingly, an unambiguous notice or expression that the pre-hire contract was being repudiated was sufficient for purposes of abrogating a pre-hire contract. *Ion Construction Co. v. District Council of Painters No. 16*,

593 F.Supp. 233, 239, *aff'd.*, 803 F.2d 1050 (CA9 1986). In *Mesa Verde Construction Co. v. Northern District Council of Laborers*, 895 F.2d 516, 520 (CA9) (Mesa Verde III), *cert. den.*, 498 U.S. 878, 111 S.Ct. 209, 112 L.Ed.2d 169 and 498 U.S. 877, 111 S.Ct. 209, 112 L.Ed.2d 169 (1990), the Ninth Circuit held that the *Deklewa* decision which abolished the unilateral repudiation doctrine was not to be retroactively applied. Thus, pre-*Deklewa* law must be applied when a party's repudiation of a pre-hire contract occurred before February 20, 1987. *Camping Construction*, 915 F.2d at 1339.

In the case below, the Board of Adjustment applied post-*Deklewa* standards for repudiation to find that Pacesetter had not repudiated the Master Agreement even though the undisputed evidence indicated that Pacesetter's acts of repudiation occurred well before *Deklewa* was decided. Thus, the arbitration panel's award fell squarely within the rule of *American Postal Workers Union v. U.S. Postal Service*, 682 F.2d 1280 (CA9 1982), *cert. den.* 459 U.S. 1200, 103 S.Ct. 1183, 75 L.Ed.2d 431 (1983), that an arbitrator's award must be vacated if the arbitrator manifestly disregards the law. Nonetheless, the district court and the Ninth Circuit refused to review the repudiation issue independently because they found Pacesetter had consented to the jurisdiction of the Board of Adjustment. Hence, the Ninth Circuit's refusal to review independently the question of arbitrability compounded the aberrant consequences of the arbitration panel's manifest disregard of the law. Therefore, this Court must take plenary review to correct the Ninth Circuit's error.

CONCLUSION

Based upon the foregoing arguments and authorities, Pacesetter Construction Company respectfully petitions this Court for a *writ of certiorari* to the United States Court of Appeals For The Ninth Circuit to review the decision below. Pacesetter Construction Company further requests that this Court, on the authority of its decision in *First Options*, reverse the judgment of the United States Court of Appeals For The Ninth Circuit and remand the case for further proceedings consistent with the intervening decision in *First Options*.

Respectfully Submitted,

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June, 1995

APPENDIX

APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 93-16627
DC No. CV-92-02113-SC

PACESETTER CONSTRUCTION COMPANY, INC.,
Plaintiff-Cross-claimant-Appellant

v.

CARPENTERS 46 NORTHERN CALIFORNIA COUNTIES CONFERENCE BOARD,
Defendant-Counter-claimant-Appellee.

Appeal from the United States District Court for the Northern District of California
Samuel Conti, District Judge, Presiding

Argued and Submitted March 13, 1995
San Francisco, California
Filed March 22, 1995

MEMORANDUM[1/]

Before: GOODWIN, CANBY, and T. G. NELSON, Circuit Judges

I.

Pacesetter Construction Company, Inc., appeals the district court's confirmation of the Carpenters Board of Adjustment's Decision and Award in favor of Carpenters Local Union No. 316. We affirm the district court's confirmation of the Decision and Award.

II.

It was appropriate for the Board to decide whether the 1981 Decision precluded it from finding that Pacesetter was bound by the Carpenters 46 Northern California Master Agreement ("Agreement"). *Local Union No. 370 v. Morrison-Knudsen Co.*, 786 F.2d 1356, 1358 (9th Cir. 1986). As long as the Board's 1992 Decision and Award drew its essence from the Agreement, the district court was constrained to enforce it even if the Board erred in its factual determination of what the 1981 Decision necessarily decided. *Phoenix Newspapers Inc. v. Phoenix Mailers Union Local 752*, 989 F.2d 1077, 1080 (9th Cir. 1993) (under most circumstances, a reviewing court is bound to defer to the

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[1/] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir. R. 36-3.

arbitrator's decision even if the arbitrator finds facts erroneously). Pacesetter has not set forth specific facts showing that the Board's determination concerning the 1981 Decision created a genuine issue as to whether the 1992 Decision and Award draws its essence from the Agreement. The district court therefore was not required to reject the 1992 Decision because of the 1981 Decision.

III.

Pacesetter has presented no evidence that Carpenters committed fraud when it represented that it could not divine the meaning of the 1981 Decision. It also has presented no evidence that Arbitrator Koven must have based his decision on repudiation. Therefore, we will not reverse the district court's confirmation of the Decision and Award on the ground that it was procured through fraud.

IV.

Pacesetter knowingly and voluntarily submitted the issue of repudiation to the Board in 1992. After the Board announced that it would consider on the merits whether Pacesetter was bound by the Agreement, thereby notifying Pacesetter that the 1992 proceeding was not a continuation of the 1981 proceeding, Pacesetter submitted the repudiation issue to the Board. Pacesetter did not preserve the question of whether the Board had jurisdiction over the repudiation issue by objecting to the Board's authority to decide the repudiation issue. *Cf. Van Waters & Rogers, Inc. v. International Brotherhood of Teamsters*, 913 F.2d 736, 740 (9th Cir. 1990) (describing ways in which party to arbitration can preserve an issue for judicial determination). Because

Pacesetter submitted the repudiation to the Board without objecting to the Board's jurisdiction over the issue, it implied its consent to have the Board decide whether it repudiated the Agreement. *George Day Const. Co. v. United Brotherhood of Carpenters & Joiners*, 722 F.2d 1471 (9th Cir. 1984).

V.

We also agree with the district court's determination that the Board accepted jurisdiction over the repudiation issue. In its Decision, the Board indicated that it would accept jurisdiction over the case, including the issue of whether Pacesetter had repudiated the Agreement, because there was no timely letter of termination. The Board then rejected Pacesetter's repudiation argument on the ground that Pacesetter had not presented evidence of a letter of repudiation on behalf of Pacesetter. The Board mentioned *Deklewa* standards, but it did not suggest that its reason for rejecting Pacesetter's repudiation argument was that Pacesetter had acted unilaterally. Therefore, the Board did not act in manifest disregard for the law in rejecting Pacesetter's argument that it had repudiated the Agreement.

VI.

Finally, we hold that Carpenters is entitled to attorneys' fees under the terms of the Agreement.

AFFIRMED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. CV-92-2113-SC

CARPENTERS 46 NORTHERN CALIFORNIA COUNTIES CONFERENCE BOARD,
Petitioner,

v.

PACESETTER CONSTRUCTION CO., INC.,
Respondent.

AND RELATED CROSS-ACTION

ORDER RE: CROSS-MOTIONS FOR SUMMARY JUDGMENT AND MOTION FOR CONFIRMATION OF ARBITRATION AWARD

Filed August 13, 1993

I. INTRODUCTION

Carpenters 46 Northern California Counties Conference Board ("Carpenters") is a union that filed a grievance against Pacesetter Construction Co., Inc.

("Pacesetter") for alleged violation of a collective bargaining agreement. Following an arbitration award in favor of Carpenters, Carpenters seeks confirmation of the award from the court. Pacesetter opposes confirmation of the award and has filed a cross-petition for declaratory relief that it is not bound by the terms of the collective bargaining agreement.

In the pending motions, Carpenters seeks summary judgment and confirmation of the arbitration award. Pacesetter seeks summary judgment of its declaratory relief action that it is not bound by the collective bargaining agreement.

II. FACTS

On June 16, 1974, Pacesetter and Carpenters entered into a memorandum agreement in which Pacesetters agreed to be bound by the Carpenters 46 Northern California Counties Master Agreement dated June 16, 1974 ("master agreement") subject to future modifications, changes, extensions or renewals.

In 1976, Pacesetter went out of business due to business losses. The California Department of Consumer Affairs revoked Pacesetter's contractor's license effective July 1, 1976. Pacesetter resumed operation in 1979. On August 8, 1979, the Department of Consumer Affairs reactivated Pacesetter's contractor's license. On October 7, 1980, the Delta-Yosemite District Council local affiliate of Carpenters filed a grievance accusing Pacesetter of violating the master collective bargaining agreement by using non-union labor.

Arbitrator Adolph M. Koven heard the grievance on May 13, 1981 and issued his decision May 20, 1981. The decision stated, "Having heard all of the evidence provided by both sides, and after careful consideration of the matter, the grievance is denied." No transcript of the hearing exists and Arbitrator Koven, now deceased, did not make any findings of fact.

The 1974-77 master agreement was modified, renewed and supplemented in the years leading up to the 1988-1993 master agreement. Section 51 of the 1988-1993 master agreement provides a grievance procedure for application and interpretation of the master agreement itself. Section 51(5)(d)(e) provides for arbitration of disputes and section 51(13) provides for confirmation awards in both state and federal court.

On June 25, 1991, Carpenters filed a grievance charging Pacesetter violated the of *[sic]* the 1988-1993 master agreement by using non-union employees. Pacesetter submitted to arbitration and raised the following issues: (1) possible preclusive effect of the 1981 arbitration ruling; (2) termination of the collective bargaining agreement prior to the grievance; and (3) repudiation of the collective bargaining agreement prior to the grievance.

On March 11, 1992, the Board of Adjustment issued is decision in favor of Carpenters. Carpenters now seeks confirmation of the decision and Pacesetter seeks denial of confirmation of the Award and declaratory relief that it is not bound by the 1988-1993 master agreement.

III. DISCUSSION

Summary judgment is proper only when there is no genuine issue of material fact and, when viewing the evidence in the light most favorable to the non-moving party,[1/] the movant is clearly entitled to prevail as a matter of law. Fed. R. Civ. P. 56(c); *Jung v. FMC Corp.*, 755 F. 2d 708, 710 (9th Cir. 1985). Once a summary judgment motion is made and properly supported, the adverse party may not rest on the mere allegations of his pleadings, but must set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *Celotex Corp. v. Myrtle Nell Catrett*, 477 U.S. 317 (1986). In addition, to withstand a motion for summary judgment, the non-moving party must show that there are "genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

The facts in this action are for the most part undisputed. However, Pacesetter raises several legal challenges to confirmation of the arbitration award. Pacesetter contends: (1) The Board of Adjustment acted in manifest disregard of the law in failing to grant preclusive effect to the 1981 arbitration Decision and Award; (2) Pacesetter repudiated the collective bargaining agreement; (3) Pacesetter terminated the collective bargaining agreement; and (4) The Board of Adjustment did not accept jurisdiction to determine the repudiation and termination issues in granting the Award to Carpenters.

[1/] *Bryant v. U.S. Treasury Dept., Secret Service*, 903 F.2d 717, 720 (9th Cir. 1990).

Pacesetter contends the Board of Arbitration acted in manifest disregard of the law by failing to grant preclusive effect, either res judicata or collateral estoppel, to the 1981 denial of grievance by arbitrator Koven. After a contested hearing in 1981, Koven issued a decision which stated, "Having heard all of the evidence provided by both sides, and after careful consideration of the matter, the grievance is denied." No transcript of the hearing exists and Koven made no findings of fact. Pacesetter maintains Koven must have found that no collective bargaining agreement existed and that the Board of Adjustment was bound by that alleged determination.

Pacesetter's reliance on the 1981 decision is misplaced. Without findings of fact or a transcript of the proceeding, the Board of Adjustment could not have determined arbitrator Koven's reasoning without lapsing into speculation. Contrary to Pacesetter's contentions, there could be other reasons for denial of a grievance beside *[sic]* the lack of a binding collective bargaining agreement.[2/]

The Board of Adjustment could not be certain of identity of issues litigated, or that the issue of existence of a collective bargaining agreement was actually litigated by the parties. In the absence of a complete record of the earlier arbitration, the Board of Adjustment properly declined to

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[2/] For example, arbitrator Koven could have found that despite a binding collective bargaining agreement, Pacesetter's actions did not warrant an Award. Similarly, Koven could have determined there was insufficient evidence provided to prove violation of the collective bargaining agreement.

grant the 1981 decision preclusive effect as to the existence of a binding collective bargaining agreement. It certainly did not act with the manifest disregard of the law necessary to prevent confirmation of the 1991 decision. See *American Postal Workers v. U.S. Postal Service*, 682 F.2d 1280 (9th Cir. 1982).

Pacesetter claims the Board of Adjustment's decision should not be confirmed since it does not "draw its essence from the collective bargaining agreement." See *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). Pacesetter maintains that the questions of repudiation and termination of the contract were not for the arbitrator to decide.

The touchstone for determining the role of the arbitrator and court in the Ninth Circuit is *Camping Construction v. District Council of Iron Workers*, 915 F.2d 1333 (9th Cir. 1990), *cert. den.*, 111 S.Ct. 1684 (1991) and 111 S.Ct. 2260 (1991). In *Camping Construction*, the district court granted a stay of arbitration to rule on the proper scope of pending arbitration of pre-1987 claims. After the district court determined that both repudiation and termination issues were proper for arbitration, the arbitration was further stayed for review by the Ninth Circuit. The Court of Appeals held that while pre-1987 termination was in fact a proper subject of arbitration, because of a narrow exception "the question of repudiation was for the court rather that *[sic]* the arbitrator to decide." *Id.* at 1339.

Thus, as demonstrated by *Camping Construction*, Pacesetter's claim that the termination issue was not subject to arbitration lacks merit. "The dispute over termination is,

as the district court held, arbitrable under the agreement here." *Id.*

The question of whether the Board of Adjustment decision should be confirmed without judicial determination of repudiation of a pre-hire agreement is more difficult. Had Pacesetter presented the repudiation issue to the court without submitting to arbitration and invoking the Board of Adjustment to rule on repudiation, the holdings in *Camping Construction* and *IBEW, Local 441 v. KBR Electric*, 812 F.2d 495 (9th Cir. 1987) would lead the court to withhold confirmation of the decision pending court determination of repudiation.

However, neither *Camping Construction* nor *KBR Electric* provide guidance as to whether a party can willingly submit to arbitration that includes the issue of repudiation, present evidence of repudiation, argue for repudiation and then raise the issue of arbitrability following an adverse ruling. In *Camping Construction*, arbitration was stayed pending determination by the Ninth Circuit. *Camping Construction*, 915 F.2d at 1336. In *KBR Electric*, the employer refused to participate in arbitration and instead presented evidence of repudiation to the district court on motion for summary judgment. *KBR Electric*, 812 F.2d at 497.

In contrast, Pacesetter did not attempt to preserve the issue of repudiation for the court. The transcript of the Board of Adjustment hearing reveals Pacesetter consented to the jurisdiction of the Board of Adjustment. Transcript of Grievance Proceedings at pp. 31, 32. Pacesetter specifically raised the issue of repudiation. "By way of argument, in

addition to the arguments on the evidence that was presented before, we would submit that any agreement that emanated form *[sic]* the 1974 agreement was repudiated by the acts of Pacesetter . . ." Transcript at p. 36. In fact, Pacesetter's pending motion for summary judgment states, "*Second, the Board of Adjustment ignored the evidence of repudiation presented by Pacesetter.*" Pacesetter Memorandum of Points and Authorities in Support of Motion for Summary Judgment, p. 17 (emphasis supplied).

In essence, Pacesetter seeks to challenge the jurisdiction of arbitrator and relitigate the repudiation issue before the Court. The Ninth Circuit has consistently rejected this approach. In *George Day Const. v. United Broth. of Carpenters*, 722 F.2d 1471 (9th Cir. 1984), the court held that having submitted an entire controversy to an arbitrator without reserving the issue of arbitrability, "the employer impliedly consented to the arbitrator's deciding both the question of arbitrability and the merits of the controversy." *Id.* at 1475.

Previously, in *Ficek v. Southern Pacific Co.*, 338 F.2d 655, 657 (9th Cir. 1964), the court held, "[A] claimant may not voluntarily submit his claim to arbitration, await the outcome, and, if the decision is unfavorable, then challenge the authority of the arbitrator to act." *Id.* at 657. See *Orion Pictures v. Writers Guild of America*, 946 F.2d 722, 725 (9th Cir. 1991).

Allowing Pacesetter to voluntarily submit the repudiation issue to the Board of Adjustment and then question the authority of the Board to act would contravene

Ninth Circuit authority and undermine confidence in the finality of arbitration.

Finally, Pacesetter argues that the Board of Adjustment never took jurisdiction over the termination and repudiation issues. This contention is belied by the discussion in the Board of Adjustment decision. The Board specifically discussed the evidence presented and the fact that it based its jurisdiction of *[sic]* evidence of a signed agreement. The Board also relied on the lack of a letter of termination and the fact, "In the case of Pacesetter there is no clear letter of [sic] consistent with the *Dekelwa [sic]* requirements. While there is a letter of repudiation for Gary Johnson there is no letter of repudiation for Pacesetter." See Board of Adjustment, decision at p. 3.

Having considered each of Pacesetter's objections to confirmation of the decision, the court turns to the standard for review of arbitration awards in the Ninth Circuit set forth in *Stead Motors of Walnut Creek v. Automotive Machinists Lodge No. 1173*, 886 F.2d 1200, 1207-1209 (9th Cir. 1989).

> Judicial scrutiny of an arbitrator's decision is extremely limited. The arbitrator's factual determinations and legal conclusions generally receive deferential review as long as they derive their essence from [the collective bargaining agreement]. If, on its face, the award represents a plausible interpretation of the contract, judicial inquiry ceases and the award must be enforced. This remains so even if the basis for the arbitrator's decision is ambiguous and notwithstanding the

> erroneousness of any factual findings or legal conclusions.

Id. at 1209.

Here, the Board of Adjustment Decision and Award drew their essence from the collective bargaining agreement. The record reveals the Board reviewed the agreement itself as well as evidence and argument from both parties. Since the decision does not appear implausible or improper, it shall be confirmed as the judgment of the court.

Having confirmed of the Board of Adjustment's decision that Pacesetter is bound by the terms of the collective bargaining agreement and for the reasons set forth above, the court denies Pacesetter's motion for summary judgment.

IV. CONCLUSION

In accordance with the foregoing, it is hereby ORDERED that:

The arbitration award issued by the Board of Adjustment on March 11, 1992, is CONFIRMED, and Respondent is hereby ORDERED to comply with the decision of the Board of Adjustment.

Petitioner's request for attorney's fees reasonably incurred in bringing this action is GRANTED.

The summary judgment of respondent and cross-petitioner Pacesetter is DENIED.

IT IS SO ORDERED.

DATED: August 12, 1993

Signed by Samuel Conti
United States District Judge

SECTION 8(f)
NATIONAL LABOR RELATIONS ACT
29 U.S.C. §158(f)

Chapter 7 — Labor Management Relations
Subchapter II — National Labor Relations

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§158. Unfair labor practices

(f) Agreements covering employees in the building and construction industry

It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor

organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to subsection (a)(3) of this section: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

(July 5, 1935, c. 372, §8, 49 Stat. 452; June 23, 1947, c. 120, Title I, §101, 61 Stat. 140; Oct. 22, 1951, c. 534, §1(b), 65 Stat. 601; Sept. 14, 1959, Pub.L. 86-257, Title II, §201(e), Title VII, §§704(a)-(c), 705 (a), 73 Stat. 525, 542, 545.)

SECTION 301
LABOR MANAGEMENT RELATIONS ACT OF 1947
29 U.S.C. §185

Chapter 7 — Labor-Management Relations
Subchapter IV — Liabilities of and Restrictions on Labor and Management

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§185. Suits by and against labor organizations

(a) Venue, amount, and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts

of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) Jurisdiction

For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) Service of process

The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) Determination of question of agency

For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

(June 23, 1947, c. 120, Title III, §301, 61 Stat. 156.)